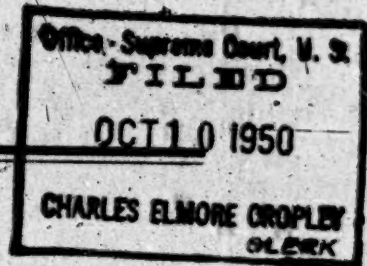


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

No. 7.

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP,
INC., ET AL.,

v.

J. HOWARD McGRATH, ET AL.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONERS.

ABRAHAM J. ISSERMAN,
DAVID REIN,
JOSEPH FORER,
Attorneys for Petitioners.

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The government's brief does not directly answer the petitioners' brief. Instead, it refers to the briefs filed by it in *Joint Anti-Fascist Refugee Committee v. McGrath*, No. 8 of this Term, and *Bailey v. Richardson*, No. 49 of this Term.

This amalgamation is made to serve more than the administrative convenience of the government. It facilitates

the suggestion that the present case is one of a group making a general attack on the government's loyalty program and seeking to set aside Executive Order 9835. It obscures the government's evasion of the facts in this case and the arguments which have been made by these petitioners. It supplies an opportunity for importing into this case an irrelevant discourse on recent history and foreign affairs as viewed by the government.

Of course, the petitioners have not attacked the loyalty program generally, vulnerable though that program is. Consistent with the recognized standards for judicial review, the petitioners have presented for adjudication the validity of the specific actions taken by the respondent to the damage of the petitioners in falsely defaming them, in abridging their exercise of the freedoms of speech, press and assembly, and in depriving them of liberty and property without a scintilla of due process.

One conspicuous fact emerges from the government's briefs. Nowhere has the government even attempted to offer the slightest justification for the harm inflicted by the respondents on the petitioners without warrant and without procedure.

I. The First Amendment.

The government concedes that the actions of the respondents have resulted in impairing the effective exercise by petitioners of their rights of speech, press and assembly. But this impairment, it contends, does not supply a justiciable controversy, because it was occasioned not directly by the respondents' actions, but by the adverse public opinion which those actions stimulated. If, nevertheless, the controversy is justiciable, then for the same reason and in the interests of the loyalty program, the government urges, the respondents' actions do not violate the First Amendment. Nothing more than the government's ipse dixit is offered to support this theory of the immunizing effect of an inter-

vening public opinion provoked by the actions complained of. No attempt is made to support this theory by reference to the purpose and function of the First Amendment. While the *Doubs* case (339 U. S. 382) is cited, conveniently overlooked is its exposition that discouragement of speech by indirect, conditional, consequential abridgement creates a justiciable controversy and may be invalid under the First Amendment. Simultaneously, the government intrudes irrelevant references to the function of "disclosure." Of course, what this case involves is not disclosure, but a false libelling.

Under the *Doubs* decision, indirect, consequential abridgements of speech, press and assembly are tested for validity by balancing the competing interests. As we pointed out in our principal brief, the National Council is, on the record, a loyal organization, affiliation with which can in no way be evidence of disloyalty. Accordingly, the listing of the National Council serves no governmental interest related to the guaranteeing of a loyal government service. On the contrary, its listing, being false, can only interfere with action legitimately designed to insure the faithfulness of government servants. This circumstance alone is dispositive. In addition, however, we insisted that the listing process as a whole served no substantial purpose in the interests of obtaining loyal government employees. Our argument to this effect is fully corroborated by the government itself. For it states: "Participation in the activities of a designated organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion based on all the evidence that reasonable grounds exist for belief that the employee involved is disloyal" (G. Br. in No. 8, at 8; and see at 22-23, and 33).

The government explains that organizational affiliation is one of the objective facts which assist the determination of the loyal or disloyal state of mind, and that centralization of the examination of the character of organizations is

administratively desirable (*id.* at 23). But this explanation is somewhat deficient. It does not explain how a listing of a loyal organization helps determine disloyalty. Nor does it explain why the centralized examination wilfully refuses to adopt any procedure which can assist making accurate, relevant determinations, and which can afford protection to the right of assembly.

We submit that the government's own description of the inutility of the listing and its failure to explain the absence of any rudimentary procedure in assistance of determination unite to belie the government's outraged insistence that the listing is not a political blacklist, but is merely a piece of information and advice for the loyalty boards (*id.* 17-18, n. 9). For whatever may be said in the Executive Order or in the Attorney General's letter to the Loyalty Review Board, the fact remains that the listing, false as it is and adopted without procedures and standards, serves only one objective purpose, that of the political blacklist. Indeed, the latter portion of the government's brief in No. 8 (at 40-50) is no more than an attempted justification of the right to establish a political blacklist, as when it states: "It is the President's duty and his right to inform the people of those groups whose activities are, in his judgment, inimical to the public welfare" (at 42).

The government carefully fails to reply to our point that a listing without hearing and without judicial review is tailored to enable the Attorney General to list any organization which he desires to injure for reasons which may be wholly invidious. It does not attempt to rebut our contention that there is nothing to prevent the Attorney General from blacklisting religious organizations, as, say, the Methodist Church, the Catholic Church, or Jehovah's Witnesses.

In fact, the Attorney General has blacklisted a religious group, having included in the loyalty program listing the Shinto Temples (see G. Br. in No. 49, at 141). For all that appears, this listing of an ancient religion may have been

occasioned only by the Attorney General's private prejudices. Indeed, it is significant that in a case involving a somewhat related factual issue, a federal District Court recently found that there was no evidence of any enemy taint to support an order of the Attorney General vesting in himself as Alien Property Custodian the assets of a Shinto shrine. *Kotohira Jinsha v. McGrath*, 90 F. Supp. 892. It is also significant that in that case, as in this, the Attorney General tried to justify his action by appealing to "security" needs as a substitute for evidence. Thus the government's argument was described as follows by the court (90 F. Supp. at 897):

But it is argued that the Court must be mindful of the times and of the danger to the United States of foreign ideologies. In this contention it is argued that Hitlerism, Communism, and Shintoism are but sisters under the skin, and who knows but the spirit of Shintoism might rise again to endeavor to conquer the world unless by vestings like this it is stamped out.

The court was forced to the following remarks (*ibid.*):

The undisguised fact is that this plaintiff's property was vested—taken away—because what plaintiff believes in was disliked or suspected, and by taking away its base of operations, its fervor for its beliefs would tend to diminish and eventually vanish. Not until the evidence was concluded was I willing to even listen to argument on this point, for I could not believe it. I still do not believe the Attorney General really acted on such a basis—even though such evidence as the Court was given might so indicate.

II. The Fifth Amendment.

As our principal brief pointed out, the petitioners are "regulated" so as to be able to invoke the protection of the Fifth Amendment because the Attorney General's list fixes the status of the National Council as a "subversive" organization for the purposes of the loyalty program. The

government concedes that the listing is a final and conclusive determination of status, but insists that the determination is not a "regulation" because the loyalty order does not make mandatory the dismissal from government service of members of the National Council.

The argument is disingenuous. Whether or not dismissal is mandatory for membership in listed organizations, the fact remains that the listing coerces government employees into leaving or refusing to join the National Council. The apprehension of being dismissed for disloyalty or even of being subjected to a loyalty investigation and hearing is enough to cause this result. We must suppose that government employees are aware that, as the government's brief in the *Bailey* case (at p. 91) puts it, "The President is entitled to insist that government servants, like Caesar's wife, be above reproach."

Contrary to the government's suggestion, the present case is stronger for petitioners' standing to sue than *Columbia Broadcasting System v. United States*, 316 U. S. 407. The regulation which the plaintiff there was held to have standing to challenge did not automatically disrupt the ties between the plaintiff and its affiliates. The regulation expressly provided that stations could remain affiliates without prejudice to their licenses during their prosecution of litigation to test the validity of a prohibition against affiliation. Yet the Broadcasting System was held able to test the regulation because, as its complaint stated, its affiliates abandoned it rather than go through the trouble and expense of litigating the validity of the regulation. The government argued in that case, as in this, that the Broadcasting System had no standing to sue because disaffiliation was not mandatory. This argument was accepted only by the dissent (316 U. S. at 445-446). It was rejected by the Court (*id.* at 424).

Furthermore, the Attorney General's list has fixed the status of the National Council for purposes other than the

loyalty program. Thus membership in a listed organization prevents an exercise of administrative discretion, unreviewable in court, to suspend deportation of an alien. Cf. *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. (2d) 489. And the listing has caused an administrative ruling depriving contributors to the National Council of a tax deduction (R. 14). Of course these contributors can litigate the denial of the deduction. But so the radio stations in the *Columbia Broadcasting System* case could litigate the denial of a license.

The government seeks to rebut the standing of the individual petitioners by *United Public Workers v. Mitchell*, 330 U. S. 75. But the *Mitchell* case merely involved a refusal by the Court to review hypothetically projected action. Here the individual petitioners complain not of a hypothetical situation, but of an actual one. Even though, in theory, ordinary members of the National Council may obtain government employment, the listing is completely meaningless if the petitioners, who guide the National Council's activities and policies, may obtain such employment. We suggest that any government official who would hire them would himself become a suspect under the loyalty program. The status of the individual petitioners is like that of the plaintiffs in *United States v. Lovett*, 328 U. S. 302, where the Court said (at 314): "Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputations and seriously impaired their chance to earn a living, could never be challenged in any court." Even in the *Bailey* case, the Court of Appeals held that the plaintiff could, even after administrative hearing, challenge the ruling barring her from future government employment. *Bailey v. Richardson*, 182 F. (2d) 46, 54, 55. Here too the individual petitioners have been effectively barred from future government employment.

III. The Tenth Amendment.

In our principal brief we urged that a suit may be brought for injunctive relief against defamation by a governmental official where the official acted in excess of his authority and Constitutional power.

We do not dispute that no action for damages for defamation will lie against public officials for statements made in their public capacity. *Spalding v. Vilas*, 161 U. S. 483. But the policy reasons which underlie that doctrine have no application here. The government argues that "the threat of prosecution for contempt for non-compliance with an injunction is as effective a deterrent to the exercise of their public functions as the threat of money damages at law" (G. Br. in No. 8 at 40). But an injunction is issued only after a judicial determination of the impermissible conduct and that conduct is precisely defined and prohibited. The suggestion that government officials should be free to take action which has been judicially determined to be illegal and unconstitutional is simply a piece of arrogance having no policy basis.

The government misplaces its reliance on *United States v. Los Angeles & St. L. R. Co.*, 273 U. S. 299, and *Tinkoff v. Campbell*, 86 F. Supp. 331. These cases merely held that defamation was not actionable if the defendant's action was within his lawful, constitutional powers. Our claim is that defamation is actionable if, and only if, it is outside of those powers, and the latter allegation is necessary to give standing to sue. The case of *Hearst Radio v. F. C. C.*, 167 F. (2d) 225, merely held that review was not available under a certain section of the Administrative Procedure Act.

The government urges that the source of the blacklisting power is Article II, sections 1 and 3, of the Constitution. But the power to send messages to Congress and to execute federal law does not by any stretch permit the executive to prescribe orthodoxy of opinion. See Jackson, J. in *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, and in *Thomas v. Collins*, 323 U. S. 516, 545.

The government suggests that the executive's actions are immunized from judicial review if they are claimed to be in the "interest of national safety," or to be part of a "national security problem," or to involve "potential threats to the government's existence." (G. Br. in no. 8, at 40-43). If constitutional rights may be suppressed simply on the basis of formal recitals that the action is taken for the national safety, it is hard to perceive that the Constitution stands in the way of naked dictatorship.

The Attorney General's listing may not be properly analogized to a speech or press statement of the President or the Attorney General. The listing is an officially promulgated regulation, published in the Federal Register, establishing a continuing rule of governmental administration, and surviving the term of office of the official who promulgated the list.

Respectfully submitted,

ABRAHAM J. ISSERMAN,

DAVID REIN,

JOSEPH FORER,

Attorneys for Petitioners.